

From: Bill Longabaugh
To: Microsoft ATR
Date: 1/23/02 1:42am
Subject: Microsoft Settlement

I am writing to comment on the proposed settlement of United States v. Microsoft. In short, the current proposal is severely inadequate to the point of being a travesty. Despite the fact that this is probably the most significant, complex, and troubling antitrust case of our generation, the Justice Department has apparently now decided to abandon the entire effort, and rush out a fatally flawed settlement full of loopholes that Microsoft can use to avoid any meaningful restrictions on its illegal behavior.

The current agreement is flawed, in that it just concentrates on trying to restrict behavior that Microsoft has used in the past to maintain its current monopoly status. However, it even fails to achieve this inadequate goal.

For example, Sections III.D and III.E state that Microsoft must document its APIs "...for the sole purpose of interoperating with a Windows Operating System Product." This completely ignores the usefulness of having APIs documented to allow Windows applications, such as Office, interoperate with a non-Microsoft operating system, such as GNU/Linux.

Also, according to Section III.J.1, Microsoft is allowed to not disclose information if it deems that it would "compromise...security". It is generally recognized within the computing security community that truly secure protocols and algorithms can be publicly distributed and discussed without compromising security. In fact, the public disclosure of this information is a way to allow consumers to determine for themselves if a supposedly secure implementation is truly secure. Thus, this provision merely provides Microsoft with just another loophole that they can use to unilaterally refuse to disclose information about the Windows operating system to independent developers.

Section III.J.2 also contains an egregious error. Since Microsoft has utterly destroyed viable commercial competition, volunteer efforts such as GNU/Linux, the Samba project, and WINE have become the best chance at providing consumer choice in PC software. However, the proposed agreement allows Microsoft to decide who it will share its API disclosures with. Specifically, Section III.J.2 allows Microsoft to decline to provide information to any party that it decides fails to meet "...reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business". Given this provision, Microsoft could easily refuse to share crucial API information to private parties who are trying to build open-source alternatives to Microsoft software.

It is also disturbing that after years of legal proceedings, the Justice Department has allowed Microsoft to continue to state in Section VI.U that "...the software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion." I feel that this belief, which Microsoft adamantly refuses to modify, lies at the core of Microsoft's illegal behavior.

Finally, there is no effective enforcement mechanism. In this regard, I quote Professor Lawrence Lessig, who has stated: "...the settlement is fatally flawed. There is no effective enforcement mechanism to assure that Microsoft lives up to the terms of the decree. The "technical committee" does not have the power to interpret the decree. The only entity that can interpret the decree is a federal court." (Quoted from: <http://slashdot.org/article.pl?sid=01/12/21/155221>)

So, the current proposed settlement, which concentrates on past behaviors, is fatally flawed. Any settlement that has any hope of correcting the imbalance in the market needs to go much further. As a minimum:

- 1) The settlement should require Microsoft to release Windows API and networking protocol information freely and without limitations. All software developers, be they private, commercial, or in the government, should be able to obtain this information. They should be able to use this information to write software that interoperates with Microsoft operating systems, as well as to develop software that allows Microsoft applications to operate with non-Microsoft operating systems. This would permit the volunteer teams working on GNU/Linux, Samba, and WINE to continue their crucial efforts to provide alternatives to Microsoft monopoly products.
- 2) In a similar fashion, file formats for the Microsoft Office suite of applications need to be made freely available, without limitations, to allow developers to create other products that interoperate with these applications. MS should be required to support those teams trying to insure interoperability.
- 3) Any Microsoft products that are available on new computers must be offered as extra-cost options on those computers, so that consumers have an option of purchasing computer hardware without an operating system. This allows users of free operating systems such as GNU/Linux to avoid having to buy products they do not want or use.
- 4) The settlement should also provide for an enforcement mechanism with real teeth, so that issues arising over the agreement can be settled without having to resort to the federal courts.
- 5) There should be a considerable fine imposed on the company for its illegal behavior.

6) Innovative structural remedies, such as requiring Microsoft to sell off their developer tools business and/or their browser business, should not be off the table. These approaches could significantly help to change the currently unhealthy dynamics in the PC software industry.

In summary, Microsoft has had far too much influence on crafting this settlement. The company has shown that it will take maximum advantage of loopholes in any agreements it makes; the 1994 consent decree was a wretched failure at restricting their illegal behavior. Since then, the federal courts have ruled that Microsoft has indeed violated the Sherman Antitrust Act, and yet the Justice Department has again allowed Microsoft great leeway in crafting a settlement. I would argue that any settlement that Microsoft can freely agree to does not go far enough; the Justice Department should use the leverage it has gained to see that the courts impose an agreement on the company that leaves Microsoft without any wiggle room that allows it to continue its illegal behavior.

The bottom line is this: if this settlement is truly adequate, why have half of the plaintiffs in this antitrust action refused to sign on, and instead have decided to continue pursuing the case? The answer is simply that this poor excuse for a settlement is utterly and completely inadequate.

Sincerely,

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